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of the suggestion coming from any other source, and all the world knows that the Japanese did make it. At practically no cost to themselves they have secured all that they were actually straining, and were prepared still further to strain, their financial resources to obtain by their ambitious building programme, now no longer necessary.

Article XIX fatally impairs for the United States the 5-3 ratio of floating strength with Japan in so far as the Western Pacific is concerned. The United States has yielded the possibility of naval equality in that region; control she has never sought. It is beside the mark to say that we are as well off as we were before the treaty. That is a half-truth—true only in the material sense; in the sense of sovereignty we have given up the right to better our situation, and that without adequate return—certainly without return in kind. Our military prestige has received a blow; and with the waning of military prestige political prestige is likely to wane also. The treaty may very well mark the beginning of a decreased influence in the Far East, with attendant loss to our proper, if selfish, trade interests, and to our altruistic purposes for China and Siberia.

In closing, permit me to remind you again of what was said at the beginning,—that this paper has been prepared from a purely military standpoint. I am not without full appreciation of other considerations, which did not appear, however, to come within the purview of my invitation to address you. This has been a material estimate of a part of the work of the Conference, aside from whatever its spiritual and imponderable achievements as a whole may prove to be.

The PRESIDENT. I have the pleasure of introducing to you Professor W. W. Willoughby, who will speak on the Far Eastern settlements of the Conference of Washington. Mr. Willoughby was the legal adviser to the Chinese Republic, 1916-1917.

PRINCIPLES OF INTERNATIONAL LAW AND JUSTICE RAISED BY CHINA AT THE WASHINGTON CONFERENCE

ADDRESS BY W. W. WILLOUGHBY

Professor of Political Science at the Johns Hopkins University

In this paper it will be my purpose neither to plead the justice of China's case as presented at the Washington Conference, nor to deal specifically with the determinations of that Conference. Rather it will be my effort to present certain of the abstract principles of international law and of international right which were advanced by the Chinese Delegation or which were implicit in the propositions presented to the Conference by that delegation, and which, it may be assumed, will continue to be held by the Chinese Government. The time allotted to this paper will not permit a full discussion

of these principles, but their character and importance can be indicated, and thus, if I do nothing more, I shall be able, I hope, to point out the more significant respects in which the relations of China with the other Powers furnish material for discussion by international lawyers, as well as for consideration by statesmen and by others interested in international politics.

First of all there is the question as to the circumstances under which, or the principles in accordance with which, the validity of existing agreements between sovereign nations may be attacked. This inquiry, it will be remembered, was raised by the Chinese in connection with the Sino-Japanese treaties and agreements of May 25, 1915, which resulted from the so-called Twenty-One Demands which Japan presented to China in January of that year. These treaties and agreements were presented to the Conference with a view to their reconsideration and cancellation.

The circumstances under which these agreements were obtained are well enough known to make it unnecessary to review them here. It is sufficient to say that the demands upon which they were predicated were made at a time when China and Japan were in full friendly relations; that they were not in adjustment of pending controversies; that Japan made no pretense of offering a *quid pro quo* for the valuable concessions she insisted upon; that the demand for these rights was in violation of engagements which Japan had with the other Powers; that they equally called upon China to enter into undertakings that were in violation of treaties between herself and the other Powers; that they were in serious derogation of China's administrative integrity; and, finally, that China's signature to them was compelled by an ultimatum upon Japan's part which threatened immediate war if it was not given.

In the Conference Japan made no attempt to defend the equitable character of these agreements, but contended herself with asserting that "if it should once be recognized that rights solemnly granted by treaty may be revoked at any time on the ground that they were conceded against the spontaneous will of the grantor, an exceedingly dangerous precedent would be established with far-reaching consequences upon the stability of the existing international relations in Asia, in Europe and everywhere."

The issue was thus gravely joined, though not decided by the Conference, whether, under the circumstances that have been mentioned, international law furnishes any principles in accordance with which a nation, so grievously wronged as China had admittedly been, could herself rightfully correct that wrong, or, in accordance with which other nations might rightfully take remedial action. It must be confessed that, if such international principles do not exist there is a want that must be supplied before international jurisprudence can claim to furnish an adequate set of doctrines or a procedure in accordance with which the essential rights of the members of the society of nations may be recognized and applied. The proposition advanced by China thus raised a question which is well worthy of careful consideration by such a body as the American Society of International Law.

As the purpose of this paper is to state rather than to discuss the principles of international law and of international justice which were involved in China's programme at the Conference, I shall limit what I have to say upon this point merely to propounding certain inquiries.

1. Will China be justified, whenever she is in a position to do so with the possibility of success, in declaring the abrogation of these agreements? As pertinent to this question it may be noted that at the time these agreements were signed and notified to the Powers, China declared that she had been constrained to accept them by an ultimatum; that in so doing she had been influenced by the desire to preserve the Chinese people, as well as the large number of foreign residents in China, from unnecessary suffering, and to prevent the interests of friendly Powers from being imperiled; and that she disclaimed any desire upon her own part to depart from the various agreements which she had with those Powers for the preservation of the *status quo* and the principle of the equal opportunity for the commerce and industry of all nations in China.

2. Can it be said that these treaties and agreements of 1915 were invalid by reason of the fact that, taken in connection with the circumstances under which they were signed, they were in violation of those fundamental principles of right upon which the whole body of international law is founded?

Leaving aside the laws of war which have for their purpose the reduction to the lowest limits of the evils of armed strife among the nations, the essential purpose of international law must be conceded to be the provision of principles governing the relations of sovereign states to one another which will, so far as possible, enable each of them to advance their own legitimate interests without prejudicing the legitimate interests of others, and which will thus enable all to live in harmony and in reciprocally helpful relations to one another,—in other words, to maintain international peace and coöperation.

For the realization of this purpose, international law founds its precepts upon certain premises with regard to the ethical rights of sovereign states which all other sovereign states are to recognize and respect. These are rights which the state, in which they inhere, has the legal as well as the equitable right to defend against violation. But, as viewed by other states, they are necessarily only ethical in character. This arises from the fact that international jurisprudence starts from the premise that each independent state is a sovereign body-politic, that is, that it has, legally speaking, unlimited powers. It has, therefore, full discretionary legal right to determine when, and under what circumstances, and for the attainment of what purposes, it will declare or threaten war against another state or take any other aggressive action toward it. Thus, at a stroke, all possibility of illegal acts upon its part is rendered impossible unless it be held that the exercise of a legal right by a state which is in violation of the fundamental principles of justice upon which international jurisprudence is itself founded is, regarded in the

light of that jurisprudence, an illegal act, and, therefore, one that is voidable by those injured by it, if not void *ab initio*.

Not to admit the foregoing conclusion destroys the foundations upon which international society rests. The Allied and Associated Powers in the World War took this ground when they asserted that there existed a right and even an obligation upon their part to correct the wrongs done in the past to Poland; to restore and indemnify Belgium; and to return to France the two provinces which, by the Treaty of Frankfort, in 1871 she had ceded to Germany. Was not the Chinese Delegation at the Conference correct, then, when it declared that a precedent would be established with consequences upon the stability of international relations that could not be estimated, if, without rebuke or protest from other Powers, one nation could obtain from a friendly but militarily weaker neighbor, under circumstances such as attended the negotiation and signing of the agreements of 1915, concessions which were not in satisfaction of pending controversies and for which no *quid pro quo* was offered? "These treaties and notes," the Chinese Delegation declared, "stand out, indeed, unique in the annals of international relations. History records scarcely another instance in which demands of such a serious character as those which Japan presented to China in 1915, have, without even pretense of provocation, been suddenly presented by one nation to another nation with which it was at the time in friendly relations. No apprehension need be entertained," the Chinese Delegation continued, "that the abrogation of the agreements of 1915 will serve as a precedent for the annulment of other agreements, since it is confidently hoped that the future will furnish no such similar occurrences."

Another question important to students of international law raised by the recent relations of China to the other Powers, is as to the binding force of treaties which have not been ratified by one or more of the parties signatory to them in accordance with the mandatory provisions of their respective systems of constitutional law. Involved in this question is also the inquiry as to the extent to which one Power in dealing with another Power is held to know the constitutional provisions of that other Power. The present speaker has found no satisfactory discussion of this subject in international legal literature. It is a notorious fact that none of the treaties and other agreements entered into during recent years with China have received that parliamentary approval which its constitution requires.

The matter of the binding force of an international agreement becomes a still more critical one when it is one that has been negotiated and signed by an official who has had no constitutional authority so to do. Thus the Sino-Japanese agreement of September 24, 1918, with reference to certain phases of the Shantung question, had no firmer basis than the acceptance by the Chinese Minister at Tokyo of conditions stated in a letter to him from the Japanese Minister for Foreign Affairs.

In close connection with the foregoing question, is the one as to the con-

tinuing force of executive understandings, such as those embodied in the Root-Takahira Agreement of 1908 and the Lansing-Ishii Agreement of 1917. In his testimony before the Committee on Foreign Relations of the United States Senate, Secretary Lansing, when asked as to his understanding of the binding force upon the United States of his agreement with Baron Ishii, replied that it had none,—that it was simply a declaration of the policy of the President or of the Department of State and terminable at his or its pleasure. And yet, though this agreement has given rise to grave misgivings in this country, and has had attached to it in Japan a significance different to that ascribed to it here, our Government has not felt free to declare, in so many words, its termination. Not even at the Conference was this done. Since the adjournment of that body, we have had the communication of March 8, 1922, of the President of the United States to the Senate, which declared that the agreement had never constituted more than a declaration of executive policy, and, of course, could not have any effect inconsistent with treaties existing at the time it was declared or subsequently entered into. But, even in this communication, the President does not assert that the agreement has been abrogated. He says merely that it has no binding effect in any sense inconsistent with the principles and policies explicitly declared in the Nine Power Treaty approved by the Powers at the recent Washington Conference. It would seem, then, that executive agreements or understandings of the character of which I have been speaking, furnish a subject to which international jurists might profitably devote attention.

Had the Shantung question been formally discussed in the Conference, the Chinese Delegation would have raised the question of the effect of her declaration of war upon Germany upon the treaties then existing between herself and Germany. Here, also, it appears that the international juristic literature is not satisfactory, or, at any rate, that international lawyers have not been able to state a rule that can be easily and certainly applied for determining what treaties are and what treaties are not abrogated, or rightfully subject to abrogation, when war arises between the parties to them. Specifically, was the Sino-German Treaty of Lease of March 6, 1898, transitory or non-transitory in character. If it had provided for an alienation or cession of the Kiaochow area to Germany it would certainly have been transitory in character. But, in fact, the treaty expressly reserved the sovereignty of China over the area, and provided merely that, for a given term of years, the German Government might exercise certain rights therein, and that the Chinese Government would abstain from exercising any of its sovereign rights there without the previous consent of Germany. Did these provisions render the treaty non-transitory in character? In the preamble of the treaty it was declared that one of its purposes was "to develop the economic and commercial relations between the subjects of the two states." Was this statement sufficient to give to the treaty a commercial character such as to render it non-transitory in character?

Another interesting legal question connected with the Sino-German Shantung Treaty, which expressly declared that Germany engaged at no time to sub-let the territory to another Power, was whether Germany obtained or could obtain the right to transfer her interests to Japan (as provided in the Treaty of Versailles) by reason of the undertaking given by China to Japan in one of the treaties resulting from the Twenty-One Demands, "to give full assent to all matters upon which the Japanese Government may hereafter agree with the German Government relating to the disposition of all rights, interests and concessions which Germany, by virtue of treaties or otherwise, possesses in relation to the Province of Shantung." Was this Sino-Japanese agreement *res inter alios acta*, so far as Germany was concerned, and therefore one from which she could derive no power? Was it therefore within the competence of Germany to transfer to Japan the rights and interests referred to in Article 156 of the Versailles Treaty? Of course, all this is now a matter of the past, but the jurisprudential principles involved are of continuing significance.¹

A further point of great importance raised in the Conference with reference to the denunciation of treaties was that contained in the declaration by Senator Underwood with regard to the right of China, upon an appropriate occasion, to escape, by a unilateral act upon her own part, from the present treaty limitations upon her power to control her own tariff policies. When the Nine Power Treaty relating to the Chinese Customs Tariff was under discussion, Senator Underwood, as reported in the minutes of the Conference, said:

He might be wrong in this matter, but he believed this treaty was not on the same basis as many other treaties involving great national rights. This was a trade agreement, a trade contract, which China had made with the other nations of the world, and he thought China had a right to denounce these treaties when she thought proper. He thought this was clearly her right, because no question of national right was involved; it was merely a question of trade agreements, and agreements of that kind had been made in the past to extend over a period of time, or an indefinite period of time, and, when conditions changed so that they worked a great disadvantage to one or others of the contracting parties, it had been recognized in the past that such trade conventions might be eliminated.²

Another respect in which occurrences in China have showed that the principles of international law are not well determined, is with reference to the right of one state to send into or to station its troops within the territory of another state for the protection there of the nationals of the sending state.

It is, of course, well recognized that, under certain circumstances, the

¹ The writer owes to the scholastic mind of Dr. James Brown Scott the suggestion of these last two points.

² This view was repeated by Senator Underwood in the United States Senate at the time the treaty relating to China's tariff was under consideration.

sending or stationing of troops is justified by accepted principles of international law, but, it is clear that these principles by no means cover some of the cases in China to which the Powers have attempted to apply them. It is my opinion that the Chinese Delegates stated the correct doctrine when they said with reference to the sending or stationing of foreign forces within the territory of another State without its express consent:

[This] can rightfully be only a temporary measure in order to meet emergencies that threaten imminent danger to the lives and property of the nationals of the states taking such action, and, upon the passing of such emergency, the forces sent should be immediately withdrawn. It is also the understanding of the Chinese Delegation that the obligation to make such withdrawal cannot, as a general principle, be rightfully postponed until the government of the state where they are located has consented to an inquiry by the representatives of other Powers into its own domestic conditions as regards the maintenance of law and order, and a report has been made declaring that there is no necessity for the presence of such foreign armed force. In other words, it is the understanding of the Chinese Delegation that accepted international law recognizes the basic right of every sovereign state to refuse its consent to the sending into or the stationing within its borders of armed forces, and that while it may, by an exercise of its own will, consent that an inquiry shall be made as to the necessity in fact of the continuance within its borders of such foreign armed forces as may be therein, such action upon its part, or a resolution by other Powers offering their co-operation in such an inquiry, is not to be deemed in derogation or limitation of the inherent right of a sovereign state to refuse entrance into, or further continuance within, its borders, of foreign armed forces.

How far Japan has departed, and still departs, from the rule thus stated is conspicuously shown in her refusal to withdraw from the city of Hankow and vicinity the troops which she has had there since 1911. There are, indeed, five reasons why this refusal is an unreasonable one, and is therefore evidence of an indisposition upon Japan's part to pay to China that respect due to her as a friendly sovereign Power. In the first place, the troops have now been maintained there for more than ten years—their stationing, therefore, despite assertions to the contrary, can, with difficulty, be termed only temporary in character. In the second place, Hankow is a place far in the interior of China and, therefore, the sending or stationing of troops there cannot be justified by analogy with the frequent occasions upon which states have felt themselves at times obliged to land troops upon the coasts of other states. In the third place, there are at Hankow many nationals of other states the governments of none of which, during these years, have deemed the situation one that required them to send troops. In the fourth place, these various groups of nationals for the most part do not live throughout the native Chinese city of Hankow, but reside in special municipal settlements or concessions with their own systems of police. Fifthly and finally, there are constantly upon the Yangtze River, upon which Hankow is located, nu-

merous gunboats of the various Powers ready at all times to give prompt assistance and protection to foreign nationals should sudden emergencies arise. For these reasons it seems evident that the continuance of the Japanese troops at Hankow furnishes a conspicuous instance in which Japan has shown, and still shows, her unwillingness to respect the rights of China. Aside, however, from the inequity of her conduct in this respect, one finds it difficult to determine the grounds upon which Japan defends it even as matter of *Realpolitik*.

Other questions of international law involved in China's relations with the other Powers, which would be worthy of discussion if there were time, are those relating to the scope and operation of the most-favored nation doctrine; the propriety, or rather the impropriety, of maintaining "police boxes," as is done by Japan in connection with the exercise by her of her consular jurisdiction in China; and the operation of inter-Power agreements relating to China but to which she is not a party.

The PRESIDENT. The last speaker of the evening is Mr. Frederick Moore, Foreign Councillor to the Japanese Ministry of Foreign Affairs.

THE FAR EASTERN SETTLEMENTS OF THE CONFERENCE OF WASHINGTON

ADDRESS BY MR. FREDERICK MOORE

Foreign Councillor to the Japanese Ministry of Foreign Affairs

Mr. President, ladies and gentlemen: I had not intended to speak without my notes as I have what I am going to say carefully prepared, but I made a couple of notes with regard to some of Mr. Willoughby's statements. The first one that struck me as rather peculiar—and I might ask him for an answer—was this point: He brought up the question whether treaties or agreements between some other state and China were proper and could be enforced if they were not ratified by the parliamentary body according to the constitution. I have not followed China's affairs for some years very intimately in detail, for I have been away from there since 1916, but prior to that time I was in China for five years, and I believe I am right in saying—I would like to be corrected if I am not—that the constitution of China does not function. There is no parliament in China. In fact no parliament in China has ever been able to ratify the original constitution. And, therefore, does Mr. Willoughby mean to contend that any agreement or understanding that is entered into by the Government of China cannot operate unless or until some parliament is established and some constitution is ratified?

Professor WILLOUGHBY. I merely asked the question. I did not answer it.

Mr. MOORE. In Mr. Willoughby's statement he raised points of legal justification. We can go far in basing questions here in the United States